(3) No. 94-745

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

MARK CHASSIN, M.D., in his capacity as New York State Commissioner of Health; LORNA H. MCBARNETTE, in her capacity as New York State Executive Deputy Commissioner of Health; STEVEN C. ANDERMAN, in his capacity as Deputy Director, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

against

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS and PETER VICKERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

THE EFFECT OF NEW YORK'S HOSPITAL ASSESSMENT ON ERISA PLANS IS AN INDIRECT ECONOMIC ONE AND WHETHER THE ASSESSMENT IS PREEMPTED WILL BE GOVERNED BY THE COURT'S DECISION IN *TRAVELERS INSURANCE COMPANY V. CUOMO*

Attempting to distinguish this case from *Travelers Insurance Company v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), in which the Court has granted certiorari, 63 U.S.L.W. 3281 (October 11, 1994) (Docket Nos. 93-1408, 1414, 1415), respondents argue that the effect of the hospital assessment involved in this case on respondents' ERISA plan is "direct" because the plan owns the hospital which is subject to the assessment. Resp. Br. at 2-3. Thus, respondents argue that this case does not warrant review because it fits into decisions that preempted laws which refer to, or single out, ERISA plans. Resp. Br. at 5 and fn.3. This argument misconstrues the state law and its effect on plans.

Section 2807-d of the Public Health Law, involved in this case, imposes a 0.6 percent assessment on hospital income received from most sources, including for patient care services. A-24.[1] The laws at issue in *Travelers* set hospital rates for all patients and impose an assessment on health maintenance organizations ("HMOs"). N.Y. Pub. Health Law § § 2807-c(1)(a),(b),(c), 2807-c(2-a). The effect on ERISA plans in both instances is indirect because these laws do not apply to the plans themselves. The hospital rate setting statute in *Travelers* applies to all hospital bills; the HMO assessment applies to all HMOs; and the hospital assessment involved in this case applies to all hospitals. Because ERISA plans may provide hospital care benefits for their participants, the hospital assessment, like the laws at issue in *Travelers*, may increase the cost of providing such benefits to

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[1] References to the appendix submitted with the petition for a writ of certiorari are shown as "A-_."

plans. Contrary to respondents' claim, however, that the assessment "assesses plan constributions," (Resp. Br. at 4), in fact, that impact occurs only because ERISA plans purchase health care services for their participants.

This analysis is not affected by the peculiar facts of this case in which an ERISA plan owns and operates the hospital which is subject to the assessment. The assessment is imposed on hospital income, regardless of source. Thus, the effect on the plan here arises only as the result of the plan's payments to the hospital to provide benefits to participants. All hospitals receive a large portion of their income for patient care services from ERISA plans, so all ERISA plans will be affected by the hospital assessment. The effect on a plan is the same whether or not it owns a hospital subject to the assessment.

The only difference between this case and a case involving a hospital not owned by an ERISA plan is simply the proportion of the hospital's total assessment which is paid by a single plan. For example, in this case, because the hospital which is subject to the assessment is owned by an ERISA plan, virtually all of the income subject to the assessment is paid by one plan. For a hospital which is not owned by an ERISA plan, the assessment will come from a number of different ERISA plans. That difference, however, does not provide a principled basis for differentiating between the effect of the hospital assessment on this ERISA plan and its effect on all other ERISA plans.

Focussing upon plans' share of the health care market would result in invalidation of myriad types of state regulation. This result would be unwarranted because state laws of general application which may increase the cost of doing business of certain ERISA plans does not impede the interstate operation of ERISA plans, which ERISA's preemption provision was designed to protect. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

Respondents rely on the brief *amicus curiae* of the United States Solicitor General ("U.S. Br.") on the petition for a writ of

certiorari in *Travelers* to support their position that this case is different than *Travelers*. The Solicitor General stated that the application of one of the provisions of New York's rate-setting statute to self-insured funds "may raise distinct issues" (U.S. Br. at 14 n.5) because it would apply to hospital bills that some ERISA plans may pay directly. However, in the brief *amicus curiae* of the Solicitor General submitted on the merits in the *Travelers* case, he made clear that the question of the application of the law to self-insured plans is not before the Court, since the district court's injunction applies only to commercial insurers and HMOs and no cross-appeal was taken by a self-insured fund. U.S. Br. at 11-12 n.3.

In any event, the Solicitor General's conclusion in *Travelers* that the state laws involved in that case are not preempted by ERISA because they do not "relate to" plans applies with equal force to the hospital assessment in this case. The effect of the *Travelers* rate-setting laws on ERISA plans remains indirect whether a self-insured plan pays the hospital bill or an insurance carrier or HMO does so on behalf of the plan. The laws do not impose any obligations on an ERISA plan to pay hospital bills or any portion of a hospital bill, but only sets the amount of the bill. Moreover, the Solicitor General has applied this analysis to the HMO assessment in *Travelers*, as well as to the rate-setting laws. The HMO assessment is paid directly by the HMO which could, in some cases, be the health care provider, just as the hospital is in this case. Consequently, to the extent an ERISA plan utilizes an HMO as a health care provider, there is no ground for distinguishing between the effect of the HMO assessment in *Travelers* and the hospital assessment here. Thus, nothing that the Solicitor has said in the *Travelers* case supports respondents' view (Resp. Br. at 3) that this case is not governed by the result in *Travelers* and worthy of review by the Court.

Finally, the hospital assessment differs significantly from the laws involved in the cases relied upon by respondents. Resp. Br. at 5. In all of those cases, unlike the present case, the courts preempted state taxes or assessments because they referred to, or were directly specifically at ERISA plans. *General Motors Corp.*

v. California Bd. of Equalization, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 585 (1991); *Birdsong v. Olson*, 708 F. Supp. 792, 798 (W.D. Texas 1989); *National Carriers Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915 (D.Conn. 1978). These cases fit squarely within the Court's holdings which have preempted state laws which refer to, are predicated upon, or which function only through the existence of, ERISA plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *District of Columbia v. Greater Washington Bd. of Trade*, __ U.S. __, 113 S.Ct. 580 (1992). The Court has never held, however, as respondents urge, that a law of general application with only an economic impact on plans is preempted. Indeed, prior holdings of the Court suggest that the economic impact of a generally applicable law is insufficient to require preemption. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (preempting section of Georgia garnishment statute which made specific reference to ERISA plans, singling them out for special treatment, but upholding section of law which applied generally to all garnishees and, thus, affected ERISA plan garnishees indirectly).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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